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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. [redacted] 138

R. R. CARR, et al., Citizens of the U. S. A., and Residents of the State of Tennessee,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

JAMES M. GLASGOW,
Assistant Attorney General,
Attorney for State of Tennessee.

GEORGE F. McCANLESS,
Attorney General.

Post Office Address:

Supreme Court Building,
401 Seventh Avenue North,
Nashville 3, Tennessee.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.
No. 1003.

R. R. CARR, et al., Citizens of the U. S. A., and Residents of the State of Tennessee,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

OPINIONS BELOW.

The Petition for Certiorari assails the decision of the Supreme Court of Tennessee in affirming the Criminal Court of Shelby County in which the seven petitioners and sixteen others were convicted of having engaged in an affray. The Supreme Court of Tennessee held that (1) the petitioners were guilty of an affray within the meaning of Tennessee law and (2) the evidence, although disputed, was sufficient for the jury to return a verdict of guilty and the verdict of the jury settled all questions concerning the credibility of the witnesses and the discrepancies in the testimony. (The text of the opinion of the Supreme Court of Tennessee is copied as Appendix B, in the Petition for Certiorari, pp. 13-16.)

JURISDICTION.

The jurisdictional allegations are totally inadequate.

The petitioners attempt to invoke the aid of Section 1 of the Fourteenth Amendment to the Constitution of the United States on the ground that there has been a denial of due process of law because ". . . there is no legal evidence to support the verdict." (Petition for Certiorari, p. 2.) The opinion of the Supreme Court of Tennessee contains a discussion of the evidence, and on its face demonstrates the frivolity of this allegation. The Court rests its opinion upon State grounds since a Federal question was not presented.

The general rule as announced by this Court is that the allegations must point out a substantial Federal question which was raised in the State courts. **Hulbert v. Chicago**, 202 U. S. 275; **Chicago, B. & Q. R. Company v. Chicago**, 166 U. S. 226, 231-2; **Stembridge v. Georgia**, 343 U. S. 541, 547; **Durley v. Mayo**, 76 S. Ct. 806. The petitioners concede that a Federal question was not presented to the State courts (Petition for Certiorari, pp. 6-8) but seek to avoid the proposition, theorizing that it was unnecessary to submit the so-called Federal question to the State courts because, according to their insistence, there was no evidence to support the jury's verdict, and hence a denial of due process resulted. As previously pointed out, the facts contained in the opinion of the Supreme Court of Tennessee completely refute this charge.

Neither do the cases relied upon by the petitioners support their theory. (Petition for Certiorari, pp. 6-8.) The case of **Craig v. Harney**, 331 U. S. 367, dealt with an alleged violation of the first amendment within the meaning of the Fourteenth Amendment, and the opinion does not discuss whether a Federal question had been raised in a State court. In **Copperweld Steel Company v. Industrial Commission**, 324 U. S. 780, this Court held that a substantial

Federal question was decided in the State courts because the exact phraseology of the Fourteenth Amendment was used although the numerical designation was not cited. The problem before the Court in **Uveges v. Commonwealth of Pennsylvania**, 335 U. S. 437, a habeas corpus proceeding, was the refusal of a State court to afford the accused with counsel. The case holds that the question was reviewable, although the State courts had no opportunity to consider the matter. We think that these cases are clearly distinguishable from the case at bar in that they do not decide, except in the habeas corpus cases, that a Federal question need not be raised in the State courts. The habeas corpus cases appear to be an exception to the general rule. **Tomkins v. State of Missouri**, 323 U. S. 485. The failure of the petitioners to allege a substantial Federal question is fatal, and the petition should be dismissed for this reason.

QUESTION PRESENTED.

The question presented was partially discussed under the heading of jurisdiction.

The conclusion of the petitioners that they have been denied due process of law is based upon their allegation asserting a lack of evidence to support the verdict. However, in arriving at this result, the petitioners have ignored the facts recited in the opinion of the Supreme Court of Tennessee, and apparently rely upon those portions of the evidence which are most favorable to them as detailed in their statement of the facts. On appeal, the petitioners were presumed to be guilty. **Johnson v. State**, 187 Tenn. 438, 215 S. W. 2d 816. They have discarded and disregarded the proof in the record which supports the presumption. (Petition for Certiorari, pp. 3-5.) They insist that, as a matter of law, these petitioners could not be guilty of the crime of an affray when they were merely present and not participating in shooting or fighting in a public place. This contention overlooks the undisputed

facts of the case and the applicability of the rule of treating aiders and abettors as principals in cases of this character. The only question involved is the application of State law which is no problem for this Court.

STATUTE INVOLVED.

The only statute involved concerns aiders and abettors who are deemed to be principal offenders. Section 109, Title 39, Tennessee Code Annotated, is as follows:

> "All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

The language in the foregoing section is identical with that found in Section 10758, Code of 1932, which was in effect when the offense was committed and the petitioners were indicted.

An affray is a common law offense in Tennessee.

STATEMENT OF THE CASE.

On August 26, 1954, the petitioners and others engaged in an affray, culminating a labor dispute between members of a labor union and the employees of Jones Brothers Equipment Company, who had contracted to construct a Butler Building at the Fairgrounds, a public place, in Shelby County, Tennessee (Tr. pp. 2-933). For several days prior to the affray, a picket line had been maintained at the entrance of the Fairgrounds (Tr. pp. 520-538, 913-928).

On Monday, August 23, 1954, when the employees of the Jones Brothers Equipment Company came to work, they found that the crank case of a truck contained molasses and that graphite, or a similar substance, had been placed in the gasoline tank of a welding machine (Tr. pp. 275-6, 813, 933).

On Tuesday, August 24, 1954, a group of men, two of whom are identified in this case, went to the Fairgrounds. They compelled a nonunion worker to come down from a ladder on which he was working and beat him with iron rods (Tr. pp. 349, 681, 725).

On the following day, August 25, 1954, a group of men, who were members of a union, assembled at the Fairgrounds, and armed themselves with baseball bats and other bludgeons (Tr. p. 359). They demonstrated against the nonunion group. The nonunion workmen armed themselves with timbers described as two-by-fours and wrenches. When the union men were confronted with this display of defensive strength, they left without a fight (Tr. p. 276).

On Thursday, August 26, 1954, about 20 or 25 members of the union arrived at the Fairgrounds in 10 or 12 automobiles for the purpose, according to their insistence, of negotiating with the foreman of the construction crew to obtain an agreement to use union labor. This group included the seven petitioners. A large number of union men assembled, according to their statements, because there was strength in numbers. The business agent of the union told the construction foreman that the union men were upset about the situation, were arming themselves with knives and other weapons, and were becoming uncontrollable (Tr. p. 727). After the conference, shortly after 1:00 p. m., the union group advanced upon the workmen engaged in constructing the Butler Building.

Several witnesses testified that the nonunion workers asked the union group a number of times not to come into the building where they were working, but to go away and leave them alone. This testimony was corroborated by the disinterested witness Bardill, who, at the time, was employed at a service station across the street from the Fairgrounds. Although he could not identify the partici-

pants from where he watched, he could see the union group advancing and saw the workers on the building run behind a wall (Tr. pp. 29-40).

The witness Mason, who was also an employee of the service station across the street from the Fairgrounds, testified that he saw the union men unload from the cars in which they had driven to the Fairgrounds and saw some of them walking around with holsters over their shoulders. Later, he saw the union men run back to their cars with something in their hands which he could not identify (Tr. pp. 163-175).

The testimony is conflicting as to what took place when the union men approached the partially constructed building. The nonunion workmen testified that the union group advanced upon them in spite of their pleas to leave them alone and not to come upon the premises. Six of the nonunion group testified that they saw W. A. White draw his pistol and commence firing toward the nonunion group. Immediately, the nonunion group ran for places of safety, procured arms, and returned the fire. Two or three of the advancing union men were wounded (Tr. pp. 452-933).

Upon the occasion, it is uncontroverted and the record affirmatively shows that all of the petitioners were present and participated in the fight. There is also proof in the record that the union workers planned the trip to the Fairgrounds and proceeded as a group after a conference in accordance with their plans.

About five minutes after the shooting, several policemen arrived at the scene where a number of arrests was made. Ambulances came and the injured were taken to hospitals. Such weapons as were found were taken by the police.

The nonunion workers did not appeal from their convictions to the Supreme Court of Tennessee.

ARGUMENT.

The petitioners have advanced various arguments in support of the petition for the writ of certiorari.

They insist that the petitioners were not guilty of an affray as defined by the State's highest court in the case of **Gillen v. State,** 185 Tenn. 193. In that case an affray was declared to be the fighting of two or more persons in a public place. Their theory appears to be that each of the petitioners must have been actually shooting to be guilty of the offense. In other words, each petitioner must have been shown to have had a gun in his hand and pulling the trigger to have been treated as an actor or punished as a principal. This is not the law of Tennessee. In the early case of **Curlin v. State,** 12 Tenn. 143 (1833), the Court was confronted with a similar contention. The Court rejected the argument and stated:

> "It (the verdict) finds that Chambers and Stanley are guilty of an affray as charged in the indictment, in fighting of Conner, and that Curlin aided and abetted in the commission of the affray. This is finding Curlin guilty of the affray; for in all the lesser offences, all persons who are in any manner concerned therein, if guilty at all, are principals, and equally guilty." (Parenthesis supplied.)

This doctrine ". . . is as old as the criminal law." **State v. Smith,** 10 Tenn. 272 (1829). Some of the cases which discuss and apply the rule are: **Moody v. State,** 46 Tenn. 299; **Reagan v. State,** 155 Tenn. 397; and **Woodruff v. State,** 164 Tenn. 530.

An examination of the undisputed facts dispels any idea that the petitioners were innocent bystanders. It was not mere coincidence that 10 or 12 cars carrying union men converged at the Fairgrounds in Shelby County, Tennessee, at approximately the same hour. Some of the mem-

bers of the union testified that they came to the Fairgrounds in response to telephone calls, while others stated that they merely intended to accompany the drivers in the cars in which they were riding. In any event, it is obvious to any reasonable man that there was some sort of prearrangement which enabled them to congregate at approximately the same time at the same place so they could confer in a group and proceed upon their mission. During the conference at the Fairgrounds, they selected a spokesman and immediately afterwards advanced in a group to persuade the foreman to employ members of the labor union instead of nonunion workers. Each and every one of them was an active participant and an actor upon the scene. Singly and collectively, they demonstrated to the smaller nonunion group that they were about to force their will upon them by persuasion, intimidation, or violence. Their numbers far exceeded those of the nonunion workers. In any event, they moved in unison and were in the process of carrying out their mission when the shooting commenced. Immediately after the shooting, a witness, who was not a participant in the affray, saw the union men return to their cars carrying something in their hands. Such facts and circumstances completely refute the claim that the petitioners were innocent bystanders. It is equally clear that the facts and circumstances were more than adequate to bring the petitioners within the rule of **Curlin v. State**, supra. It should be noted that the facts were sufficient to convince the jury of the petitioners' guilt beyond a reasonable doubt.

The petitioners also complain of discrimination as to the verdict of the jury, because the punishment of the nonunion workers was less than that imposed upon the petitioners. However, no mention is made of the fact that the petitioners themselves did not receive the same punishment. Obviously, the contention is without merit. As pointed out by the Supreme Court of Tennessee, this was

a matter for the jury. Apparently, the jury decided that the petitioners and their cohorts were the aggressors, and to some degree those in the nonunion group were attempting to defend their rights. (Petition for Certiorari, Appendix B, p. 15.) Long ago, the Supreme Court of Tennessee held that where two persons engaged in an affray, one may be acquitted and the other convicted. **Cash v. State**, 2 Tenn. 198 (1813). Therefore, it is insisted that this contention of the petitioners is without substance.

The petitioners observe that most of the testimony was given by police officers, who testified chiefly as to the finding of guns and ammunition. (Petition for Certiorari, p. 5.) This observation is unwarranted and is not supported by the record. Much of the testimony of the officers consisted of identifying statements given by many of the participants in the affray. The statements were admitted in evidence without objection from able defense counsel, although the Court, at the request of the State, instructed the jury that they could not be considered in determining the guilt of any person other than the one making the statement. The statements are not only relevant, but are highly informative as to the intent, motive, and degree of participation of the various actors.

The observation also fails to take into account the testimony of the witnesses Bardill and Mason, who were disinterested spectators, being employed at a service station across the street from the Fairgrounds (Tr. 29-40, 163-175). The observation does not correctly characterize the evidence, as we understand it.

In the final analysis, these petitioners are seeking to have this Court weigh the evidence presented to the jury and substitute its judgment for the conclusions reached by the jury. The jury's verdict forecloses the question of the weight to be given to the testimony of the respective witnesses, and although this Court might have reached con-

clusions differing from those of the jury, or might have assessed punishments other than those given, it does not follow that these are valid grounds for granting the writ of certiorari. On the contrary, these are matters to be determined exclusively by the State courts, and since the Supreme Court of Tennessee has rested its opinion exclusively upon State law and has affirmed the judgment of the trial court, there is no reason for granting the writ.

CONCLUSION.

In conclusion, the respondent respectfully insists that the petition should be dismissed for the reasons stated above and the reasons and authorities contained in the opinion of the Supreme Court of Tennessee.

Respectfully submitted,

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JAMES M. GLASGOW,
Assistant Attorney General,
Attorney for State of Tennessee.

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GEORGE F. McCANLESS,
Attorney General.

Post Office Address:

Supreme Court Building,
401 Seventh Avenue North,
Nashville 3, Tennessee.

Certificate of Service.

The undersigned, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the respondent, hereby certifies that on the ..... day of July, 1956, he served the within and foregoing

reply brief upon the petitioners in the following manner as prescribed by Rule 33, Revised Rules of the Supreme Court of the United States. He deposited at the Post Office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief securely enclosed in an envelope, airmail postage duly prepaid, addressed to the following at his post office address as stated below, that is to say:

Honorable H. G. B. King,
723 Chattanooga Bank Building,
Chattanooga, Tennessee.

.....

James M. Glasgow,
Assistant Attorney General.